

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELIGIO DE LA PAZ)	
Claimant)	
VS.)	
)	Docket Nos. 133,539, 154,373
ERMAN CORPORATION)	& 172,398
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE COMPANY)	
(133,539))	
INSURANCE COMPANY OF NORTH AMERICA)	
(154,373))	
HOME INSURANCE COMPANY (172,398))	
Insurance Carriers)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Both claimant and respondent, through its insurance carrier, Home Insurance Company, appeal from the Award of Administrative Law Judge Robert H. Foerschler dated December 11, 1997. Oral argument was held June 16, 1998, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, Luis O. Mata of Kansas City, Kansas. Respondent and its insurance carrier, National Union Fire Insurance Company, appeared by their attorney, John B. Rathmel of Overland Park, Kansas. Respondent and its insurance carrier, Insurance Company of North America, appeared by their attorney, Gary R. Terrill of Overland Park, Kansas. Respondent and its insurance carrier, Home Insurance Company, appeared their attorney, William A. Wolff of Kansas City, Kansas.

The Kansas Workers Compensation Fund appeared by its attorney, Thomas Kelly Ryan of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the parties stipulate, in the stipulations section of the Award, the November 1, 1992, date for Docket No. 172,398 should read November 17, 1992, and on page 8 of the Award, the second to the last full paragraph, the November 17, 1990, date should read November 17, 1992.

In addition, claimant requested that, on page 10 of the Award, the third full paragraph from the top, the 40 pounds lifting restriction should instead read 20 pounds. However, National Union Fire Insurance Company later objected to this requested stipulation. This objection was then joined by the Kansas Workers Compensation Fund. Therefore, the Appeals Board will consider this as an additional issue in this matter.

ISSUES

Docket No. 172,398

- 1) Whether claimant met with personal injury by accident on November 17, 1992.
- 2) Whether claimant's alleged accidental injury arose out of and in the course of his employment on the date alleged.
- 3) Whether claimant is entitled to unauthorized medical compensation.
- 4) Whether claimant is entitled to future medical compensation.
- 5) Should claimant be assessed the cost of the deposition of Dr. Harry Overesch?
- 6) What is the nature and extent of claimant's disability, if any?
- 7) Are respondent and its insurance carrier, Home Insurance Company, entitled to a credit against an award issued in

claimant's favor in Docket No. 154,373, against respondent and its insurance carrier, Insurance Company of North America?

- 8) The compensation due.
- 9) The liability of Kansas Workers Compensation Fund.
- 10) Is this an appeal of only Docket No. 172,398, or are Docket Nos. 133,539 and 154,373 so interrelated with Docket No. 172,398 as to necessarily require their review in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board makes the following findings of fact and conclusions law:

The Appeals Board finds this matter constitutes an appeal of all three docket numbers. The Appeals Board has held in the past that, when an award contains multiple docket numbers, an appeal of one docket number constitutes an appeal of all. In addition, in this matter the respondent and Home Insurance Company have requested a credit pursuant to K.S.A. 44-510a against the Award issued in Docket No. 154,373. This credit was granted by the Administrative Law Judge in the Award with a contribution factor of 100 percent. It would be impossible to consider the appropriateness of the credit in Docket No. 172,398 without considering the facts and evidence relevant to the other docket numbers. Therefore, the Appeals Board considers this matter to be an appeal of all three docket numbers.

Claimant, a manual laborer, worked for respondent, Erman Corporation, for many years. He had several jobs with respondent, but his primary work involved manual labor in respondent's railroad equipment salvage operation, primarily cutting and welding and moving salvage metal.

In Docket No. 133,539, claimant alleges accidental injury on December 19, 1988, when he hurt his right shoulder and rib cage when a crane, supporting a heavy magnet, hit a tank claimant was leaning against and knocked him into some coworkers. Claimant was off work for three to four months, experienced difficulty lifting his hand, and complained of discomfort in his right shoulder. Claimant was treated by Dr. Abella and Dr. Harry Overesch. Dr. Overesch found claimant had suffered no permanent impairment as a result of that 1988 injury. Claimant, however, was later examined by Dr. Edward J.

Prostic, who opined claimant suffered a 5 percent impairment for scapulocostal syndrome, and a 10 percent impairment for rotator cuff tendinitis, for a 15 percent impairment to the shoulder.

Due to the disagreement about the functional impairment ratings, the Administrative Law Judge referred claimant to an independent medical examiner, Deborah Ruggles, M.D., a physiatrist, who examined claimant on March 23, 1995. Dr. Ruggles found a limited range of motion in the claimant's right shoulder, although this was much more pronounced with voluntary movement rather than passive movement. She felt claimant had a 7 percent impairment to the body as a whole based upon his limited range of motion.

The Administrative Law Judge found the opinion of the independent medical examiner to be the most credible, and awarded claimant a 7 percent permanent partial impairment of the body for the 1988 shoulder injury. Claimant returned to work with respondent at a comparable wage subsequent to this injury, therefore, no work disability is appropriate. The Appeals Board finds an award of 7 percent to the body as a whole is appropriate, and affirms same.

After returning to work, claimant was injured in a nonwork-related automobile accident in 1990, and received medical treatment from Dr. John Williams, a chiropractor. Claimant suffered neck and head pain as a result of that accident, and missed work for a brief period. On October 18, 1990 (Docket No. 154,373), while cutting an aluminum tank, claimant pulled a hose that was stuck. When it came loose, claimant lost his balance, fell backwards, and struck his rear on a large block. Claimant was again referred to Dr. Overesch for treatment to his low back, and was off work for between 11 months and one year. Claimant was also referred to Dr. Ketcherside for treatment and physical therapy.

The record contains multiple medical opinions dealing with claimant's functional impairment and limitations after the 1990 injuries to his neck and low back. The Administrative Law Judge, in considering the opinions of not only Dr. Overesch and Dr. Prostic, but also the reports of Dr. Zimmerman and Dr. Ruggles, found claimant to have suffered a 5 percent permanent partial impairment for the October 1990 injury to his low back. No contribution from the 1988 shoulder injury was found. The Appeals Board, in considering the evidence, finds claimant has suffered a 5 percent permanent partial impairment to the body as a whole as a result of this injury, and the Award of the Administrative Law Judge in that regard is affirmed.

Claimant was then returned to light-duty work for approximately three months, earning comparable wages. He was returned to his regular job in October 1991, but alleges he continued to self-accommodate and avoid lifting heavy weights. Claimant

continued working for respondent until November 17, 1992, when he was cutting part of a train that had turned over. While he was standing on a section of the train, it dropped approximately a foot, causing a jarring injury to claimant's low back, which forced him to stop working. Claimant reported this injury to his superintendent, Joe Ruttman, and was taken to Bethany Medical Center. Claimant has not worked since that injury.

After the November 17, 1992, injury, claimant has been unable to return to work with respondent. However, claimant has made little effort to obtain other employment. K.S.A. 1992 Supp. 44-510e defines the extent of permanent partial general disability to be the extent, expressed as a percentage, to which the **ability** of the employee to perform work in the open labor market and to earn comparable wages has been reduced. The language of that statute does not consider whether claimant is actively searching for employment. It instead focuses upon what ability claimant may or may not have to earn wages.

In considering the requirements of K.S.A. 1992 Supp. 44-510e, the Appeals Board considers first the opinion of Donald R. Vogenthaler, claimant's vocational expert. Mr. Vogenthaler, in considering claimant's ability to "perform work and earn money", opined that claimant had experienced a 100 percent work disability. He opined claimant was unable to perform any substantial, gainful work activity, and required English instruction before he could obtain any employment. However, on cross-examination, he admitted that certain doctors who had seen claimant were less convinced about claimant's lack of ability to perform work.

Dr. Overesch opined claimant had experienced no permanent disability, expressing concern about claimant's self-limitation of movement, since he could detect no objective reason for claimant's limited range of movement.

Dr. Prostic found a limitation in lateral bending of claimant's lumbar spine, but with the exception of some hamstring tightness, the rest of the tests appeared normal. He expressed concern that claimant may have a symptom magnification disorder, but nevertheless assessed claimant a 15 percent impairment for his low back problems. He did note that claimant's pain reports were more severe than he would have anticipated, but acknowledged he had not run any psychological tests and was not a psychologist. He admitted it was possible claimant may be intentionally magnifying his symptoms in order to gain financial advantage, and opined that he did not believe claimant was 100 percent disabled, and was in fact capable of performing some work.

Claimant was also examined by Dr. P. Brent Koprivica on February 12, 1993. He found claimant to be severely limited in his motion in his back, but felt to a certain degree it was a self-limitation. He did not believe his examination indicated claimant's true capabilities, based upon objective physical findings. He could find no specific neurological

deficits, although he did express concern about the possibility of radiculopathy into the left leg, at the time of the evaluation. He also noted some evidence of non-psychogenic pain or symptom magnification during his examination. Dr. Koprivica opined that the November 17, 1992, injury resulted in no increased functional impairment beyond that which claimant experienced in 1990.

Dr. Koprivica did, however, provide certain restrictions to claimant. He felt claimant should be limited to the light work category under the Dictionary of Occupational Titles (DOT). This would include a 20-pound occasional lift, 10-pound frequent lift, and no constant activities. He acknowledged that, if claimant was working under a 40-pound restriction prior to November 17, 1992, that would have been in the medium category under the DOT. This does indicate a modification of claimant's limitations after the November 17, 1992, injury. He acknowledged that claimant, who had been diagnosed with degenerative disc disease, should avoid repetitive bending, pushing, pulling, and twisting activities which would put wear and tear on his already damaged discs. He also acknowledged that, if the job claimant was performing prior to the November 17, 1992, injury required that the claimant repetitively bend, kneel and twist, it would have been outside of the restrictions that he imposed on claimant in March 1994.

The Administrative Law Judge felt that Mr. Vogenthaler's opinion that claimant was 100 percent disabled was not supported by the evidence. The Appeals Board agrees with that finding.

Claimant was examined by Mr. Michael Dreiling at respondent's request. Mr. Dreiling felt claimant had suffered a 60 percent loss of access to the open labor market as a result of the injury suffered in 1992. He also felt claimant retained the ability to earn \$6 per hour which equates to an average weekly wage of \$240. This, when compared to claimant's average weekly wage for the 1992 accident of \$352.52, equals a wage loss of 32 percent. K.S.A. 1992 Supp. 44-510e requires that both the loss of access to the open labor market and loss of ability to earn comparable wages be considered when assessing a work disability. While the statute does not specifically obligate that each prong be given equal weight, the Appeals Board finds no justification for providing either prong with greater weight in this instance, and therefore finds that claimant has suffered a 46 percent permanent partial work disability as a result of the November 17, 1992, accident.

The Appeals Board further finds that a credit under K.S.A. 44-510a is appropriate when considering the injury suffered by claimant in October 1990. Claimant had a 5 percent permanent partial impairment to the body as a whole for that injury, and the Appeals Board finds that the contribution factor for that injury is 100 percent.

With regard to the liability of the Kansas Workers Compensation Fund for the injury occurring on November 17, 1992, it is noted that Dr. Prostic had the opportunity to examine claimant on several occasions. When asked whether or not the 1992 injury would have been sustained but for claimant's preexisting diseases, Dr. Prostic felt that it would not have occurred but for the preexisting disease. Dr. Koprivica also opined that the 1992 injury would not have occurred but for the preexisting problems associated with the claimant's back.

K.S.A. 1992 Supp. 44-567(a)(1) states:

Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

In considering the opinions of both Dr. Koprivica and Dr. Prostic, the Appeals Board finds that the injury occurring on November 17, 1992, would not have occurred but for the claimant's preexisting, substantial back problems, and therefore the liability for this injury shall be assessed 100 percent against the Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Awards of Administrative Law Judge Robert H. Foerschler dated December 11, 1997, in Docket Nos. 133,539 and 154,373 should be, and are hereby, affirmed.

With regard to the Award in Docket No. 172,398, the Appeals Board finds the Award of the Administrative Law Judge should be modified, and finds that an award should be granted in favor of the claimant, Eligio De La Paz, and against the respondent, Erman Corporation, and its insurance carrier, Home Insurance Company, and the Kansas Workers Compensation Fund, for an injury occurring on November 17, 1992, for a 46 percent permanent partial impairment to the body as a whole. The Appeals Board further finds a contribution factor of 100 percent for the injury occurring on October 18, 1990.

Claimant is entitled to 306.43 weeks permanent partial disability compensation at the reduced rate of \$95.44 per week totaling \$29,245.68, followed by 108.57 weeks

permanent partial disability compensation at the unreduced rate of \$108.11 per week totaling \$11,737.50, for a total award of \$40,983.18.

As of December 9, 1998, there is due and owing claimant 306.43 weeks permanent partial disability compensation at the reduced rate of \$95.44 per week totaling \$29,245.68, followed thereafter by 9.86 weeks permanent partial disability compensation at the unreduced rate of \$108.11 per week totaling \$1,065.96, making a total due and owing of \$30,311.64. Thereafter, the remaining balance of \$10,671.54 shall be paid at the unreduced rate of \$108.11 per week for 98.71 weeks, until fully paid or until further order of the Director.

Future medical treatment for claimant's injuries may be awarded upon proper application to and approval by the Director in all of the above awards.

Claimant is awarded \$350 unauthorized medical in each case above upon presentation of itemized statement verifying same. This includes the charges of Dr. Prostic, which were not provided at the time of his deposition.

Medical mileage as ordered by the Administrative Law Judge is affirmed pursuant to the Award.

The cost of the second transcript of the Dr. Overesch deposition is assessed against the respondent. While respondent objected at the time of the taking of the deposition, calling the deposition duplicitous, the Appeals Board finds sufficient issues remained in contention to justify the taking of the deposition of Dr. Overesch after that of Dr. Prostic with regard to the inquiry of the causation of the low back injury, and the role that the different injuries might have had on the resulting low back injury.

Costs associated with the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carriers, including a \$200 interpreter fee, to be paid as follows:

Hostetler & Associates, Inc.	\$1,250.55
Metropolitan Court Reporters, Inc.	\$1,423.74
Jo Lynn Rice, R.P.R.	\$ 557.75
Gene Dolginoff Associates, Ltd.	\$2,527.90

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Luis O. Mata, Kansas City, KS
 John B. Rathmel, Overland Park, KS
 Gary R. Terrill, Overland Park, KS
 William A. Wolff, Kansas City, KS
 Thomas Kelly Ryan, Overland Park, KS
 Robert H. Foerschler, Administrative Law Judge
 Philip S. Harness, Director